Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02047/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following the hearing	
On 20 June 2014	**On 22 July 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAHAMED ABDIASIS

Respondent

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Miss V Laughton, Counsel, instructed by Duncan Lewis & Co

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Somalia who was born on 26 October 1986. He arrived in the UK on 17 October 1994 aged almost 8 years. He was granted exceptional leave to enter on 27 September 1995 until 27 July 1996. Thereafter he was granted indefinite leave to remain on 5 June 2001.

3. He is a person who has amassed a considerable number of convictions for various different types of offence. The most recent offence he committed resulted in a sentence of twelve months' imprisonment on 27 November 2012 in the Crown Court sitting at Blackfriars. That was for offences of supplying controlled drugs of class A and B. He was also made subject to an anti-social behaviour order for a period of five years.

4. The consequence of the most recent conviction and was an automatic deportation order on 4 October 2013 made pursuant to Section 32 of the UK Borders Act 2007.

5. His appeal against that decision came before a panel of the First-tier Tribunal on 29 January 2014. The First-tier Tribunal allowed the appeal on Article 8 grounds, finding that there was an exception to the automatic deportation provisions. The Secretary of State challenges that decision for reasons set out in the grounds before me and supplemented in oral submissions by Mr Parkinson.

6. The panel made a number of findings of fact including that the appellant arrived at the age of 8 years or so, that he had no real ties to Somalia and that if he speaks Somali it is only a few words. It also concluded that he has no contact with anyone in Somalia and has no relatives or friends there upon whom he could call for assistance. The panel accepted that whilst growing up he regarded himself as British and does not regard himself as being Somalian in any sense other than formally. The panel went on to conclude that he has relatives in the UK but that there was some doubt about the amount of contact that he had with his mother before his current period of detention. However, it was accepted that there was some level of contact between them. That contact was limited because of his mother's mental health difficulties. It was also found that he had previously been placed in the care of the local authority.

7. Further findings were made in relation to his circumstances in terms of family members in the UK. So far as the index offence is concerned, the panel concluded that he did present a medium risk of harm to the public but that this was at the lower end of medium, and that he also presented a medium risk of reoffending. It was concluded that his reoffending was likely to be related to illegal drugs.

8. The First-tier Tribunal considered the current situation in Somalia starting by referring to the current country guidance decision in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC). It noted the conclusion of that decision that there remains in general a real risk of Article 15(c) harm for the majority of those returning

to Mogadishu after a significant period of time abroad, subject to certain exceptions. The panel also noted what was said about Article 3 to the effect that the armed conflict in Mogadishu does not create a real risk of Article 3 harm in respect of any person in that city regardless of circumstances. The panel took into account the submissions made on behalf of the respondent to the effect that the situation in Mogadishu had improved to such an extent that the panel should no longer follow the country guidance in AMM.

9. In the determination there is reference to the background material, or at least some of it, to which the panel was referred. However, it was concluded at [59] that the situation had not improved sufficiently in Mogadishu for it to be concluded that there was not a real risk that the appellant would suffer Article 15(c) harm.

10. At [58] of the determination the conclusion was that the appellant had not established any real risk of Article 3 harm on return to Mogadishu. Although vulnerable as a result of his lack of ties to Somalia and lack of language ability, it was found that he was capable of working and his knowledge of English was likely to be of advantage to him, thus not placing him at real risk of Article 3 harm on return.

11. The panel noted that one of the exceptions to the automatic deportation provisions does not include Article 15(c)/humanitarian protection. On behalf of the appellant argument had been advanced in relation to whether humanitarian protection should be read into Section 32 of the UK Borders Act 2007. It is not necessary for me to express a view about that because, as I indicated at the start of the proceedings before me, it seems to me that the assessment of whether there is an error of law in the decision of the First-tier Tribunal can be made with reference to the grounds and submissions before me on the relatively narrow basis as set out in the grounds.

12. Although the panel concluded that humanitarian protection was not within the scope of the exceptions to the UK Borders Act it nevertheless concluded at [62] that it was a significant factor which must be taken into account when considering Article 8. The panel went on to conclude that the fact that there is a real risk of Article 15(c) harm for the appellant was a matter that was significant in proportionality terms and ultimately it concluded that his removal was disproportionate. It followed from that that the panel was satisfied there was an exception to the automatic deportation provisions, that is to say not Article 15(c) but human rights grounds, namely Article 8 of the ECHR.

13. The respondent's grounds as originally formulated at paragraph 2 attack the conclusion of the First-tier Tribunal by stating that the panel found that the appellant would be at risk of Article 15(c) harm and that that did not amount to an exception to the automatic deportation provisions. It seems to me that that ground misunderstands the basis on which the panel allowed the appeal and I think in the way the argument was advanced

before me by Mr Parkinson, it is clear that he also recognised that that was a misapprehension of the way the panel decided the appeal.

14. The panel expressly concluded at [60] that Article 15(c) did not amount to an exception to the automatic deportation provisions, but it was undoubtedly the case as accepted by Mr Parkinson, that it would be a relevant factor in the assessment of proportionality under Article 8. In effect it was accepted on behalf of the respondent before me that if the panel was right to conclude that there was an Article 15(c) risk for this appellant on return to Somalia it was all but inevitable, if not actually inevitable, that the appeal would have to be allowed on Article 8 grounds because it could not be said to be proportionate to return someone to a country where they are at risk of serious harm in terms of Article 15(c).

15. Mr Parkinson advanced argument that was arguably different from that articulated in the grounds. He sought to persuade me that the panel had not given sufficient reasons for concluding that this appellant would be at risk of Article 15(c) harm on return.

16. Miss Laughton objected to that line of argument on the basis that it was not in the grounds and there had been no application to amend the grounds. There was indeed no application before me to amend the grounds, Mr Parkinson contending that the way the grounds were drafted is sufficiently wide to cover the argument that he advanced.

17. I do not consider that that is a matter that actually needs to be resolved because I am satisfied that the panel did give adequate reasons for concluding that the appellant would be at risk of Article 15(c) harm on return. It considered the country guidance decision by which it was bound and the panel looked at the country background material to which it was referred. The assessment was that the appellant would be at risk of Article 15(c) harm on return.

18. At [59] the panel concluded that the situation had not improved sufficiently to be able to say that there was not a real risk that the appellant would suffer Article 15(c) harm. It is said on behalf of the respondent that there was inconsistency in that conclusion. Thus at [58] it states that the panel was not satisfied that the appellant is at real risk of Article 3 harm but was capable of working and his knowledge of English is likely to be an advantage to him.

19. It was submitted that it was for that reason that it was concluded that there was no Article 3 risk. But it seems to me that that paragraph is simply part of the reasoning process by the Tribunal weighing one factor and another in the assessment of whether the appellant would be at risk on return in Article 3 terms.

20. In any event, the current state of country guidance is that, bar certain limited categories of people, there remains in general a real risk of Article

15(c) harm and on that basis alone it seems to me that the panel would have been entitled to conclude that the appellant would be at such risk.

21. At [59] the panel referred to the appellant's lack of ties to Somalia including Mogadishu and his lack of language skills, plainly this being a reference to his knowledge of the Somalia language. The panel was bound to take into account individual circumstances in assessing the Article 15(c) risk and that in my judgment is what it did.

22. In the decision in Elgafaji [2009] EUECJ C-465/07 it was said, in effect, that there was a sliding scale in the assessment of risk in terms of Article 15(c). Individual characteristics do need to be taken into account.

23. It may be that the panel could have given more detailed reasons on this issue, but the assessment of whether there is an error of law in a decision it is not a search for perfection. I am satisfied that sustainable reasons were given by this Tribunal.

24. In those circumstances it does also seem to me that it was inevitable that finding that the appellant would be at risk of Article 15(c) harm on return, it would be concluded that his removal would be disproportionate. I cannot see circumstances in which it would be proportionate under Article 8 to return someone to a country where they would be at risk of harm in that sense.

25. Those conclusions are sufficient to dispose of the Secretary of State's appeal. Nevertheless I touch briefly on the other grounds that have been put before me.

26. It is said that the panel failed to identify any exceptional circumstances in this case which would outweigh the Secretary of State's public interest policies. That argument is subsumed within the Article 15(c) point.

27. An argument was advanced in terms of whether the panel wrongly took into account that the appellant only nearly missed meeting the requirements of the Immigration Rules in terms of paragraph 399A(b). At [65] the panel said that the appellant is over the age of 25 but only by a year or so. It went on to state that

> "We recognise the fact that he has only nearly missed coming within the provisions of paragraph 399A(b) is not, of itself, a factor in his favour but only insofar as it is relevant to the weighing of the competing interests."

28. Mr Parkinson contends that that is an impermissible factoring in of a near miss argument. Miss Laughton, on the contrary, contends that the panel did not take into account a near miss, expressly stating that it was not of itself a factor. For my part, at the very least it seems to me that the panel could have been clearer in their articulation of the extent to which near a miss did, or did not, feature in their deliberations. If their conclusion was that a near miss was a factor to be taken into account that was an impermissible conclusion.

29. But in any event, even if the panel did err in law in this respect, it is an error of law that is not material to the outcome of the decision, having regard to the conclusions I have come to in terms of their assessment of Article 15c.

30. Lastly, it is said that the panel failed to have sufficient regard to the public interest in deportation in terms of the risk of reoffending. Certainly that is referred to in the grounds. At [64] the panel stated that they bore very much in mind the public interest in deportation of foreign offenders. It also went on to say that it took into account that an exceptionally strong case has to be shown before Article 8 rights, in particular the Article 8 right to private life, outweighs the public interest in deportation. At [66] it is stated that the panel recognised the great public interest in deportation in this case.

31. In the circumstances, I am satisfied that the panel did recognise the significant public interest that needed to be taken into account in deportation cases where offences result in terms of imprisonment that come within the Immigration Rules and the automatic deportation provisions of the UK Borders Act 2007.

32. In any event, again, even if there is an error of law in this respect, it is not an error of law that is material to the outcome in the light of the conclusions I have come to in terms of Article 15(c).

33. In summary, my conclusion is that there is no error of law in the First-tier Tribunal's decision and even if there is an error of law it, or they, are not errors of law that mean that the decision should be aside.

Upper Tribunal Judge Kopieczek 18/07/14